IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-516047 "R"
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Orlando Rosales HOPPE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1884

Orlando Rosales HOPPE

This appeal has been taken in accordance with Title 46 United States Code 239 (g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 17 November 1969, an Examiner of the United States Coast Guard at Long Beach, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a steward utility on board SS ROBIN KIRK under authority of the document above captioned, Appellant:

(1) on or about 23 September 1969 wrongfully failed to perform his assigned duties while the vessel was ported [sic] in Manila, P.I.;

(2) on or about 24 September 1969 wrongfully assaulted the Chief Steward with threats to wit, "You no good m----- f----- I'll kill you," at Manila, P.I.;

(3), (4), and (5)

on or about 9, 10, and 11 September 1969, respectively, wrongfully absented himself from the vessel and his duties without leave, at Manila, P. I.

At the hearing, Appellant did not appear. The Examiner entered a plea of not guilty to the charge and each specification. The Investigating Officer introduced in evidence voyage records of ROBIN KIRK.

There was no defense.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 25 March 1970. Appeal was timely filed. Although ample time was allowed, Appellant has chosen to add nothing to his original notice of appeal.

FINDINGS OF FACT

On all dates in question, Appellant was serving as a steward utility on board SS ROBIN KIRK and acting under authority of his document while the ship was in the port of Manila, Republic of the Philippines.

On the 9th, 10th, and 11th of September 1969, Appellant, without permission, was absent from the ROBIN KIRK and failed to perform his assigned duties on 23 September 1969.

At approximately 10:45 on the morning of 24 September 1969 Appellant entered the P.O. messroom and said to the Chief Steward, J. Cobb, "You no good m----- f-----, I'll kill you," and then took a swing at the Chief Steward, stating to him, "You get me logged for yesterday ."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that Appellant was in the U.S.P.H.S. Hospital, San Francisco and unable to be present at the hearing, decision and order in Long Beach, California November 17, 1969. Appellant also denies the charges.

APPEARANCE: Appellant, pro se.

OPINION

The charges in this case were served on 7 October 1969. At the time, notice of hearing was given for 1000 on 13 October 1969. Appellant acknowledged service of the charges and notice of his rights. He acknowledged notice also that if he did not appear pursuant to notice the hearing might be conducted in absentia.

Appellant did not appear on 13 October 1969. The hearing proceeded in absentia. to ultimate findings, ascertainment of prior record, and declaration that the hearing was closed. 17 November 1969, the date chosen by Appellant in asserting his inability to be present because of hospitalization was not the date of hearing but only the date on which the Examiner's written decision was issued.

Once Appellant failed to appear pursuant to notice, without even attempt to provide adequate explanation, he forfeits his rights to further notice even if circumstances dictate continuances of the open hearing. In any event, under the procedures now

authorized in 46 CFR 137.20-175, nothing happened on 17 November 1969 for which Appellant would have been entitled to notice so that he could be present on 13 October 1969.

II

Appellant's denial of the charges is untimely. The mere naked denial, of course, means nothing. If Appellant had appeared for hearing a plea of not guilty would have constituted a denial of the charges and required proof of the allegations. The Examiner's entry of not guilty pleas accomplished the same result, and proof was forthcoming.

If Appellant had wished to do more than plead not guilty it was necessary for him to do so before the Examiner. His right to do so was forfeited by his failure to appear.

III

There is a matter not raised by Appellant which I must consider since it constitutes clear error.

The second specification, as drawn, and as found proved does not spell out "assault." The Examiner concluded:

> "There was reliable, probative and substantial evidence which established that the respondent, while serving as aforesaid, did on or about 24 September 1969 wrongfully assault the chief steward, J. Cobb, with threats, to wit: `you no good m----- f----- I'll kill you, "as alleged in the second specification which is hereby found proved."

It is hornbook law that "assault" is basically an attempt to commit a battery. State v Davis, 23 N.C. 125, 35AM. Dec. 735. Mere threatening or abusive language has long been held not to constitute (Chapman v State, 78 Ala. 463, 56 Am. Rep. 42), although more recently some jurisdictions have differed (State v. McIver, 321 N.C. 313, 56 SE 2nd 604; but see the extensive annotation on this decision at 12 ALR 2nd 971).

The general rule for the latter proposition is probably better explicated on the reverse of the coin. Under the general law an assault may be met by justified self-defense, such that the defender is not guilty of assault and battery. Except where the rule may have been modified by statute, it is practically universally accepted that[mere words, however threatening or abusive, do not justify the use of force by the addressee. Keiser v State, 71 Ala. 481, 46 Am. Rep. 342. Thus, threatening or

abusive language does not constitute assault, without more.

The specification here, thus, does not allege an offense of assault, and the Examiner's conclusion does not state that an offense of assault was found proved.

IV

It is easy to see how the Examiner was led into this error.

The evidence adduced at the hearing tended to prove that at the time of use of the threatening language Appellant "took a swing at the chief steward." In his findings of fact the Examiner found that Appellant "took a swing" at the chief steward. What the evidence tended to prove and what the Examiner found as fact constitute assault whether Appellant had spoken or not.

In the ordinary case the rule of Kuhn v Civil Aeronautics Board. CA, D.C. Cir. (1950), 183 F. 2nd 839, might be invoked here on the theory that a matter not discussed in the notice of hearing was actually litigated by the introduction of proper evidence on the point and the fault of the original specification was cured by the Examiner's finding even if he did not go to the point of amending the pleadings to conform to the proof. This recourse is not available. Appellant did not appear for the hearing.

A failure of a person to appear for the hearing after proper notice cannot prevent litigation of a matter as to which he was on notice. A failure to appear does, however, frustrate litigation of a matter as to which he had been given no notice. Appellant here was never on notice that his hearing involved assault by taking "a swing" at another person but only that he was charged with assaulting another person with words, without more. This latter, as I have pointed out, does not constitute assault. Without proper notice, Appellant cannot be held to a finding that he committed assault by "taking a swing" at someone.

V

The question remains whether the second specification must be dismissed or whether there is something salvable of it.

In a specification of assault, it is frequent that the coupling of threatening words with gestures may spell out a proper allegation. I have often held that the use of threatening or abusive language to a fellow seaman, especially to a superior, is misconduct. Decision on Appeal No. 1473.

The language used in the instant case was both threatening and

abusive. Although it was improperly linked to a concept of assault, it was language that formed the basis for an allegation of misconduct. Since the language was alleged as "threats" and was proved as a threat, Appellant was properly on notice that a threat was to be litigated. It does not matter that the threat did not constitute an assault. The threat could be and was litigated after notice.

It is proper to reduce the second specification from assault to wrongful use of threatening language, and I shall do so.

VI

This raises a new question: should the Examiner's order be reduced to reflect the change from a finding of assault to a finding of use of threatening language required by an error in pleading.

On a bare record I might give serious thought to whether the error should not call for a reduction of the order. The evidence clearly establishes that an assault was actually committed but this of itself will not justify a refusal to consider mitigation of the order. The record is far from bare, however.

Appellant's prior record is as follows:

(1) 1965, 15 April, New York; warning for two failures to perform because of intoxication;

(2) 1965, 29 September, New York; suspension of three months on twelve months' probation, for five acts of misconduct;

(3) 1966, 21 November, Mobile; suspension of seven months for three acts of misconduct;

(4) 1968, 2 February, Mobile; suspension of three months, plus six months on twelve months' probation, for four acts of misconduct.

The instant case involves five acts of misconduct, all of which constituted violation of the probation ordered at Mobile. The total, over four years, amounts to twenty-four acts of misconduct encompassed in five separate proceedings under R.S. 4450 and 46 CFR 137.

The table at 46 CFR 137.20-165 contemplates as appropriate for an order of revocation any fifth offense found proved, barring unusual circumstances, over fifteen years. While Appellant has had only five actions taken against him, I repeat that they encompass

twenty-four offenses over a period of four years. Especially in view of the violation of probation found here, I would be undermining the discretion vested in examiners to make appropriate orders if I should arbitrarily and capriciously reduce the order of revocation entered of revocation entered in this case.

CONCLUSION

I conclude that the second specification in this case must be amended to delete the words as specified and found proved, from "on or about" to the end, and to substitute therefor this language:

> "On 24 September 1969 did wrongfully use threatening language to the chief steward of the vessel."

The specification as amended is found proved.

Order

The order of the Examiner dated at Long Beach, California, on 17 November 1969, is AFFIRMED.

T.R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 3rd day of August 1972.

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